

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

KAHLA M. PRACHT
Claimant

V.

HCA HEALTH SERVICES KANSAS, INC.
Respondent

AND

ZURICH AMERICAN INSURANCE CO.
Insurance Carrier

Docket No. 1,038,883

ORDER

Respondent and insurance carrier (respondent), through Anton Andersen, request review of Administrative Law Judge Gary Jones' October 30, 2015 Post Award Medical Award (the Award). Phillip Slape appeared for claimant. This matter was placed on the Board's summary docket for disposition without oral argument. The Board has carefully considered the entire record and the parties' arguments.

ISSUES

The judge awarded claimant medical treatment for her right knee and ordered respondent to pay her medical expenses after she filed her application for post-award medical. The judge denied medical treatment for claimant's left knee, finding she did not prove current treatment is needed to cure and relieve the effects of her 2007 work injury.

Respondent requests reversal, arguing claimant's need for right knee treatment is not a direct and natural consequence of her 2007 work incident. Respondent contends the greater weight of the evidence proves claimant's need for treatment results solely from the natural progression of her degenerative joint disease and ordering treatment violates public policy. Respondent also argues the judge erred in ordering the payment of medical bills incurred for right knee treatment because the bills were not at issue or submitted into evidence. Finally, respondent asserts review of the judge's denial of treatment for claimant's left knee may not be reviewed because it was not appealed.

Claimant requests the Award be modified to include treatment of the left knee, arguing Dr. Do opined she needs treatment for both knees. Claimant asserts her current need for treatment is the direct and natural consequence of both her 2007 injury and the natural aging process.

The issues are: (1) is claimant's current need for medical treatment to one or both knees related to her 2007 work injury, and (2) based on due process, should respondent have been ordered to pay medical bills?

FINDINGS OF FACT

On August 30, 2007, claimant slipped on a floor and was injured while working as a registered nurse for respondent. She “hyperextended” her left leg and “fell” on her right knee.¹ Claimant had a history of bilateral knee pain going back to at least April 2007, when she received bilateral cortisone injections and was prescribed medications.

Respondent terminated claimant’s employment in November 2007. Claimant has worked elsewhere, including currently at a Veterans Administration Hospital as a telephone triage nurse, a sedentary job which only requires her to be on her feet about 30 minutes in an eight hour day.

On February 4, 2010, claimant was evaluated by Pat Do, M.D., a court-appointed neutral physician, for purposes of an impairment rating. He noted claimant had a November 14, 2007 MRI of her right knee that showed “wear and tear perhaps even down the bone and that was on the weightbearing portions of her bone.”² Dr. Do diagnosed claimant with bilateral knee pain, patellofemoral chondromalacia and some underlying degenerative joint disease. Dr. Do assigned claimant a 5% lower extremity impairment for each knee based on patellofemoral chondromalacia.

On May 5, 2010, claimant’s case was resolved at a settlement hearing. The terms of the settlement included the right to seek future medical treatment upon application to the Director of Workers Compensation.

Claimant filed an Application for Post-Award Medical treatment on December 4, 2014. Claimant specifically asked respondent for a list of three physicians from which she could select one doctor to provide authorized medical treatment.

Bonnie Charles Smothers, M.D., is board certified in family medicine and has treated claimant since November 2011. Prior to January 2015, claimant would mention to Dr. Smothers during appointments that she had knee pain, but it was not the primary focus of the appointments. However, on January 22, 2015, claimant presented to Dr. Smothers specifically for chronic knee pain. Claimant told Dr. Smothers her knee pain was due to her 2007 accidental injury and her pain never resolved completely. Claimant reported having pain in both knees, with her right knee being worse than her left. Dr. Smothers diagnosed claimant with obesity and knee osteoarthritis. The doctor prescribed Norco. On January 29, 2015, Dr. Smothers injected both of claimant’s knees with Hyalgan. Dr. Smothers testified claimant should be evaluated for potential knee surgery.

¹ P.H. Trans. at 33; see also P.A.H. Trans. at 11-12.

² Do. Depo., Ex. 2 at 34.

While Dr. Smothers believed claimant's 2007 work accident possibly exacerbated claimant's preexisting and underlying osteoarthritis, she could not definitively say claimant's 2007 injury was contributing to claimant's knee pain in 2015 or say within a reasonable degree of medical certainty that claimant's current knee issues were directly related to the 2007 work accident. Dr. Smothers preferred to have a specialist provide an opinion regarding this issue.

Dr. Smothers said injuries can accelerate the need for treatment in patients with osteoarthritis. When asked if claimant's current knee presentation is a direct and natural consequence of the 2007 work injury, Dr. Smothers testified:

A In part, I would say yes.

Q Okay. So in other words, it is possible that her presentation as she sits here today, that she may need to have surgical treatment for her knees, is it possible that that was accelerated, that her presentation was accelerated as a result of that 2007 injury?

A It is possible, yes.

Q Okay. And you had described earlier that traumatic injuries can accelerate the need for treatment when you see osteoarthritis in patients.

A Right.

...

Q. When we're talking about this acceleration after a traumatic incident, is that something you would normally expect to see immediately after the traumatic incident or is that something that could happen several years down the line?

A Let me think about that. We talked about an acceleration of osteoarthritis. You are right that, like, if - - in a posttraumatic - - like in a posttraumatic arthritis, if that's the singular cause of someone's arthritis, they have this injury and from then on everything happens, you will see an acute presentation of symptoms. You will see a kind of atypical presentation of osteoarthritis. You'll see it in younger patients. You'll see, yeah, a more rapid acceleration.

But again, after we kind of talked through things a little bit, I don't think Kahla neatly fits into that category. But in posttraumatic arthritis specifically, yes, you'll see - - it wouldn't take eight years for things to worsen. I mean, you see it within a couple of years usually.³

³ Smothers Depo. at 25-27.

On May 7, 2015, claimant went on her own to Dr. Do because of bilateral knee pain. The doctor examined her knees and suggested physical therapy, a home exercise program and MRI scans of the knees. The knee MRIs were done on May 22, 2015. The right knee MRI showed high grade patellofemoral chondromalacia, a mild patellar subluxation, a likely patellar tracking abnormality, no meniscal or ligamentous tear, a small knee effusion and small Baker's cyst, with the left knee MRI showing moderate to high grade patellofemoral chondromalacia, no evidence of internal derangement and a tiny Baker's cyst.

In a letter prepared by claimant's counsel and signed by Dr. Do on May 26, 2015, the doctor noted claimant's then-current need for medical treatment for her right knee was related to her August 30, 2007 injury or was so related because the accident aggravated, accelerated or exacerbated her right knee condition. Dr. Do declined to agree with alternative content in the letter that claimant's then-current need for medical treatment was in no way related to the 2007 work injury.

Dr. Do recommended a right knee arthroscopy, which he performed on July 22, 2015. The surgery included a partial medial meniscectomy, extensive synovectomy and chondroplasty of the patella and trochlea. Dr. Do testified claimant's meniscus tear could have been new or it could have been present when he saw claimant in 2010.

Dr. Do had no records indicating respondent or its insurance carrier pre-approved or authorized the treatment he provided claimant in 2015. Dr. Do acknowledged claimant's surgery scheduling form asked for authorization through Blue Cross.

Following surgery, claimant continued treating with Dr. Do. He testified the next treatment would be to try some lubricant shots to coat the areas of arthritis or cartilage wear and tear, or if claimant becomes symptomatic enough, knee replacement surgery.

Dr. Do testified claimant's 2007 injury did not cause the preexisting wear and tear in the weight-bearing portions of her right knee. Dr. Do testified claimant's degenerative knee condition was her major problem and the main reason he performed surgery in 2015.

In addressing whether claimant's 2007 work injury contributed to claimant's current need for treatment, Dr. Do testified:

- A So in her case it would be complicated. I don't know how you separate out the different issues. Back in 2007, 2010, in the weight-bearing portions of her knee, she was already - - probably already worn down the bone. But now you take 2007, you take it fast forward eight years, you're going to have wear and tear from the natural and probable consequence of aging, and then you also have that injury of August 30th of 2007 also contributing to some of her current need for treatment.

Q Okay. So you performed surgery. Was the need for that surgery accelerated or aggravated to the point where she needs that surgery that you performed in July, or is that more related to the degenerative problems?

A It's a combination of both. So anything that we did in the front - - if you want to be truly anatomic about it, anything in the front compartments of her knee that are non-weight-bearing where she hit her knee, that would be more related to her work injury of August of 2007. Any work - - like the degenerative meniscus tear would be more due to the natural and probable consequence of aging. So I don't know how you separate the two areas out.⁴

Dr. Do believed it would be reasonable to surgically replace both of claimant's knees if her pain was bad enough. Dr. Do opined the 2007 work injury aggravated and accelerated claimant's need for a knee replacement, but it was a small percentage or degree. He testified his opinion that claimant sustained an aggravation or acceleration of her degenerative joint disease was premised on the accuracy of claimant's statement to him that she fell and "struck both knees"⁵ in 2007. Dr. Do acknowledged claimant was a candidate for knee replacement prior to her 2007 work accident. He agreed there was no objective showing claimant's degenerative knee condition changed because of her 2007 fall, only that she reported increased pain. Dr. Do also agreed claimant had risk factors for degenerative joint disease, such as being a woman, her age (58) and her morbid obesity, and noted her sit-down job would increase her risk for knee pain in general because of inactivity and decreased muscle strength.

Claimant testified her preexisting bilateral knee pain gradually worsened after her 2007 work injury. While claimant did not receive treatment to her knees between 2009 and 2015, she testified she complained of bilateral knee pain every time she saw a nurse practitioner or physician.

The judge stated on pages five and six of the Award:

The present need for treatment to the Claimant's knees arises primarily from the Claimant's preexisting degenerative joint disease and the natural aging process. Her knees have apparently now deteriorated due to osteoarthritis to the point where she needs treatment. However, according to Dr. Do, the work accident also contributed to the current need for treatment. Under the law as it existed at the time of this accident, if the work accident aggravated, accelerated or exacerbated a preexisting condition, then the medical treatment for the entire condition is allowed. Therefore, the Court concludes that the Respondent is responsible for the current treatment to the Claimant's right knee based on the testimony from Dr. Do.

⁴ Do Depo. at 16-17.

⁵ *Id.* at 28.

The Claimant has not met her burden to prove that any current treatment to the left knee is necessary to cure and relieve the effects of the original injury. Dr. Do's opinions were based on an assumption that the Claimant struck both knees when she fell in 2007. According to the Claimant's testimony at the post-award hearing, the right knee was the one that struck the floor and the left knee was hyper-extended. Dr. Do's opinion regarding the left knee was based on an incorrect assumption and is therefore not persuasive.

. . .

The Claimant's request for treatment and payment of medical expense incurred since the date of filing the application for post-award medical for the right knee is sustained. Bills incurred for treatment of the right knee after the application for post-award medical was filed are ordered paid. The Respondent is ordered to provide a qualified physician to treat the right knee.

The request for treatment and payment of bills related to the left knee is denied.

Thereafter, respondent filed an appeal.

PRINCIPLES OF LAW

The burden of proof is on claimant to establish her right to an award of compensation.⁶ Post-award medical treatment can be awarded if the need for medical care is necessary to cure or relieve the effects of the accidental injury which was the subject of the underlying award.⁷ An accidental injury is compensable even where the accident only aggravates or accelerates a preexisting condition.⁸

The law in effect on the August 30, 2007 date of claimant's accidental injury controls the determination of the present issue.⁹

K.S.A. 2007 Supp. 44-508(e) states a "personal injury" or "injury" is a "lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence."

⁶ K.S.A. 2007 Supp. 44-501(a).

⁷ K.S.A. 2007 Supp. 44-510k(a).

⁸ *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, 514, 949 P.2d 1149 (1997).

⁹ *Bryant v. Midwest Staff Solutions, Inc.*, 292 Kan. 585, 588, 257 P.3d 255 (2011).

“When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.”¹⁰

Nance states, “The passage of time in and of itself is not a compensable injury. Thus, where the deterioration would have occurred absent the primary injury, it is not compensable. However, where the passage of time causes deterioration of a compensable injury, the resulting disability is compensable as a direct and natural result of the primary injury.”¹¹ In *Nance*, “there was undisputed testimony that the primary injury had worsened, quite likely through the normal aging process and the passage of time. The worsening of a claimant's compensable injury, absent any intervening or secondary injury, is a natural consequence that flows from the injury. It is a direct and natural result of a primary injury. Since *Nance*'s worsening back condition is merely a continuation of his original injury, causation is not an issue.”¹² In *Nance*, the Kansas Supreme Court noted that even though the doctor who testified about *Nance*'s condition did not directly or affirmatively state “that the deterioration of *Nance*'s injury is a direct and natural consequence of the first injury,” such conclusion was the “inevitable result of his testimony.”¹³

ANALYSIS

Based on the current record, respondent is responsible for providing medical treatment for claimant's right knee, but not for her left knee.

Respondent argues claimant needs right knee treatment solely due to the natural progression of her osteoarthritis.

Dr. Do testified the 2007 injury aggravated and accelerated claimant's need for right knee surgery in 2015 and she could presently consider injections. It is true claimant's need for treatment, in large part, is due to her preexisting arthritis. Nonetheless, Dr. Do testified claimant's current need for treatment was at least in part contributed to by her 2007 injury. Dr. Do testified claimant's 2007 accidental injury aggravated and accelerated her degenerative joint disease. Based on appellate court precedent and the status of the law for a 2007 accidental injury, the Board concludes claimant's current need for right knee treatment is necessary to cure or relieve the effects of her 2007 accidental injury.

¹⁰ *Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972).

¹¹ *Nance v. Harvey County*, 263 Kan. 542, 550, 952 P.2d 411 (1997).

¹² *Nance v. Harvey County*, 23 Kan. App. 2d 899, 909, 937 P.2d 1245, *aff'd*, 263 Kan. 542, 952 P.2d 411 (1997).

¹³ *Nance*, 263 Kan. at 553.

The Board also affirms the judge's current denial of treatment for claimant's left knee. Dr. Do's opinion that claimant had an aggravation or an acceleration of her preexisting condition was premised on claimant's history that she fell and struck both knees. In this case, absent an accurate history, Dr. Do's causation opinion does not rise to a probability of being more likely than not accurate.

The order for payment of claimant's medical bills, when there was no issue before the judge for payment of medical bills, deprived respondent of due process. Thus, the order for payment of medical bills is reversed.

The Kansas Constitution requires that all parties receive procedural due process of law.¹⁴ "The essential elements of due process of law in any judicial hearing are notice and an opportunity to be heard and defend in an orderly proceeding adapted to the nature of the case."¹⁵ "To satisfy due process, notice must be reasonably calculated, under all of the circumstances, to apprise the interested parties of the pendency of an action and to afford the parties an opportunity to present any objections."¹⁶

There was no issue before the judge regarding claimant's past medical bills she incurred with Dr. Do. Respondent contends the bills were not placed into evidence and no issue regarding payment of medical bills was presented to the judge for a ruling. While respondent does not use the term "due process," it complains it did not have notice and an opportunity to be heard. Respondent had no notice claimant's medical bills were in dispute. The order for payment of medical bills is reversed. If the parties so desire, the issue may be taken up with the judge with appropriate advance notice.

CONCLUSIONS

Having reviewed the evidentiary record, the stipulations of the parties, and the parties' briefs, the Board affirms the Award with respect to respondent being required to provide medical treatment for claimant's right knee, but not for claimant's left knee. The Award is reversed regarding payment of medical bills for claimant's right knee that she incurred on her own subsequent to filing an Application for Post-Award Medical.

All five members of the Board have considered the evidence and issues presented in this appeal.¹⁷ Accordingly, the findings and conclusions set forth below reflect the majority's decision and the signatures below attest that this decision is that of the majority.

¹⁴ Kan. Const. Bill of Rights, § 18.

¹⁵ *Collins v. Kansas Milling Co.*, 207 Kan. 617, Syl. ¶ 2, 485 P.2d 1343 (1971).

¹⁶ *Johnson v. Brooks Plumbing, LLC.*, 281 Kan. 1212, Syl. ¶ 4, 135 P.3d 1203 (2006).

¹⁷ K.S.A. 2014 Supp. 44-555c(j).

AWARD

WHEREFORE, the Board affirms in part and reverses in part the October 30, 2015 Post-Award Medical Award, as set forth in the “Conclusions” section.

IT IS SO ORDERED.

Dated this _____ day of January, 2016.

BOARD MEMBER

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